No. 12209.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FREDA MARY VOKAL, CHARLES DAVISON, and ROMEYN B. SAMMONS, Executors of the Estate of Paul F. Vokal, Deceased,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

Jurisdictional Statement.

Jurisdiction of this Court is established by Title 28, United States Code, Section 400, Title 28, United States Code, Section 41(1), and by the provisions of Section 403(c) of the Renegotiation Act.

Statute.

Section 403(c)(4) of the Renegotiation Act of 1943 provides as follows:

> "(4) For the purposes of this section the Board may make final or other agreements with a contractor or subcontractor for the elimination of excessive profits and for the discharge of any liability for excessive profits under this section. Such agreements may contain such terms and conditions as the Board deems advisable. *Any such agreement shall be con-*

clusive according to its terms; and except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact; (A) such agreement shall not for the purposes of this section be reopened as to the matters agreed upon, and shall not be modified by any officer, employee, or agent of the United States, and (B) such agreement and any determination made in accordance therewith shall not be annulled, modified, set aside, or disregarded in any suit, action, or proceeding." (Emphasis supplied.)

Statement of the Case.

Pursuant to the Renegotiation Act the War Contracts Price Adjustment Board entered into a Renegotiation Agreement with the appellants Paul F. Vokal and Freda Mary Vokal for the payment of $38,442.26, excessive profits for the fiscal year ended December 31, 1943. The tax credit to which appellants are entitled under Section 3806 of the Internal Revenue Code is $13,001.22. The said appellants did not petition The Tax Court of the United States for a redetermination of the amount of excessive profits received by them as provided by Section 403(e) of the Renegotiation Act, and the period for filing such petition has expired.

The Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., in compliance with withholding orders issued to them by the Under Secretary of War, withheld for the use of the United States amounts otherwise due the appellants, Paul F. Vokal and Freda Mary Vokal. Thereafter the appellants filed suit against Garrett Corporation, being No. 508,756, and against the California Institute of Technology, being No. 510,156, both in the Superior Court in and for the County of Los Angeles, State of California,

for recovery of the money so withheld. Appellants did not file suit against Douglas Aircraft Company, Inc.

Appellee filed its Amended Complaint against Paul F. Vokal and Freda Mary Vokal wherein it prayed for a declaratory judgment determining that the renegotiation agreement entered into between the parties be declared wholly valid and enforceable; that defendants have no interest in any amounts withheld by Garrett Corporation, California Institute of Technology, and Douglas Aircraft Company, Inc., pursuant to the withholding orders, and have no right to the recovery by suit or otherwise to any of the amounts so withheld; and that the defendants Paul F. Vokal and Freda Mary Vokal be restrained from prosecuting their suits now pending in the Superior Court in and for the County of Los Angeles, State of California, against Garrett Corporation and California Institute of Technology [T. R. 8].

By their Answer appellants admitted that they executed the said Agreement attached to the Amended Complaint [T. R. 16]. They have not pleaded or offered to prove any fraud or malfeasance inducing the execution of the contract.

Upon a Motion for Summary Judgment the Court concluded:

(a) That a valid agreement had been entered into;

(b) There was no genuine issue as to any material fact for the reason that defendants had "not pleaded or offered to prove any fraud or malfeasance or a willful misrepresentation inducing the execution of the contract."

The Motion for Summary Judgment of the Appellee, United States of America, was granted.

POINT I.

The Answer Did Not Raise Any Genuine Issue of Fact.

Careful examination of the Answer does not disclose any fraud or malfeasance or a wilful misrepresentation on the part of the War Contracts Bond. The question presented by a motion for summary judgment is whether or not there is a genuine issue of fact. Rule 56c, Federal Rules of Civil Procedure, does not contemplate that the court shall decide such issue of fact, but shall determine only whether one exists. (*Ramsouer v. Midland Valley R. Co.,* 135 F. 2d 101, 103 (C. C. A. 8).)

In the case of *United States v. Maryland Casualty Co.,* 147 F. 2d 423 (C. C. A. 5), the court said:

> "Summary judgments are looked upon with favor and will be upheld unless some genuine issue of fact is presented."

Rule 56c does not provide any method for exactly determining the presence of any issue of fact, and so each case depends upon the facts peculiar to it. Speaking in general terms, the court is not authorized under the rule to try issues of fact but it has the power to penetrate the allegations of fact in the pleadings and look to any evidential source to determine whether there is an issue of fact to be tried. (*Pen-Ken Gas & Oil Corporation v. Warfield Natural Gas Co.,* 137 F. 2d 871 (C. C. A. 6).)

The court in *Schreffler v. Bowles,* 153 F. 2d 1 (C. C. A. 10), says at page 3:

> "The salutary purpose of Rule 56 is to permit speedy and expeditious disposal of cases where the pleadings do not as a matter of fact present any sub-

stantial question for determination. Flimsy or transparent charges or allegations are insufficient to sustain a justifiable controversy requiring the submission thereof. The purpose of the rule is to permit the trier to pierce formal allegations of fact in pleadings and grant relief by summary judgment when it appears from uncontroverted facts set forth in affidavits, depositions or admissions on file that there are as a matter of fact no genuine issues for trial."

See, *e. g.*:

Sabin v. Home Owners' Loan Corporation, et al., 151 F. 2d 541 (C. C. A. 10);

Madeirense Do Brasil S/A v. Stulman-Emerick Lumber Co., 147 F. 2d 399 (C. C. A. 2).

The appellants, although given an opportunity to file affidavits in support of the contentions in their Answer, failed to file them.

In *Gifford v. Travelers Protective Assn. of America*, 153 F. 2d 209, at page 211 (C. C. A. 9), the court gave an opportunity to plead by way of reply and says:

"By failing to avail himself of this opportunity, plaintiff in effect admitted the facts alleged in the affidavit supporting the motion for summary judgment and left the trial court no alternative."

Also in *Engl v. Aetna Life Ins. Co.*, 139 F. 2d 469, 473 (C. C. A. 2), it is said:

"Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment."

The Trial Court determined that Appellants' Answer did not raise any issues which fell within the exception of Section 403(c)(4) of the Renegotiation Act.

POINT II.

The Defense Set Forth in the Answer of Appellants May Not Be Raised in This Court.

The constitutional validity of the Renegotiation Act has been settled by the Supreme Court. (*Spauling, et al. v. Douglas Aircraft Co., Inc., et al.,* 154 F. 2d 419 (C. C. A. 9); *Pownall, et al. v. United States,* 159 F. 2d 73 (C. C. A. 9); *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.,* 331 U. S. 752.)

The statute comes before the court replete with provisions to protect contractors and to assure fair treatment to all aggrieved persons. It is the product of most careful congressional consideration. Rarely has the operation of legislature been so carefully watched, so widely discussed; rarely have hearings on the disputed points been so intensive; rarely has there been such a studious effort to establish fair administrative procedure designed to protect public and private interests alike; and rarely has there been such a high degree of administrative success.

The Act authorizes the War Contracts Board to make final or other agreements with a contractor [403(c)(4), Reneg. Act of 1943] and "any such agreement shall be conclusive according to its terms, except upon a showing of fraud or malfeasance or a willful misrepresentation of a material fact." To defeat appellee's action the appellants must show that fraud, malfeasance or willful misrepresentation of a material fact induced the contract. Therefore, the primary question which the Trial Court had to deter-

mine was whether the United States Government, acting through its agents, the War Contracts Board, induced the execution of the contract entered into with appellants by fraud or malfeasance or a willful misrepresentation.

Prior to the entering into of an agreement the Act provides for a conference with the contractor by giving notice and a hearing in an endeavor to make a final or other agreement with him with respect to elimination of excessive profits [403(c)(1), Reneg. Act, 1943]. A hearing in fact was given to appellants and every opportunity to present evidence and argument. They do not contend that they were not given such a hearing for their Answer does not indicate otherwise.

On February 25, 1944, the Renegotiation Act of 1942 was amended by the Revenue Act of 1943. Section 403(e)(2) of the Renegotiation Act, as amended, made a special remedy available to a contractor who felt aggrieved by a unilateral determination of the Secretary of the amount of excessive profits made after the enactment of the Revenue Act of 1943 by providing for a redetermination of the amount of such profits by The Tax Court of the United States. Section 403(c)(1) of the statute provides that the renegotiating officials shall furnish to contractors upon request a statement of facts used as a basis for and the reasons for the Board's determination [see T. R. 15]. Before signing the Renegotiation Agreement[1] the appellants could have submitted the

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[1]See Exhibit A attached to Amended Complaint, T. R. pp. 9-15.

amount determined by the War Contracts Board for hearing upon its merits to The Tax Court. Under the Renegotiation Act The Tax Court's functions must be fully performed before judicial intervention may take place at the instance of a litigant.

In the case of *Aircraft & Diesel Equipment Corp. v. Hirsch, et al.,* 331 U. S. 752, the Supreme Court held that the doctrine of exhaustion of administrative remedies applies to such issues as statutory coverage and amount. The contention made by the appellants that the Board did not have jurisdiction because the contracts were less than $500,000 is one of coverage and falls within the jurisdiction of The Tax Court. See, also, *Sampson Motors, Inc. v. United States,* 168 F. 2d 878 (C. C. A. 9).

Since appellants ignored the privilege of going to The Tax Court when the opportunity was made available, they obviously cannot now complain, and their failure constitutes an election to abide by the determination as to the amount agreed upon. To permit appellants to maintain the suits against Garrett Corporation and California Institute of Technology after they have foreclosed by their own actions the right of redetermination, would in face of the statute make a mockery of it.

In *Lichter, et al. v. United States,* 160 F. 2d 329, Aff'd. 334 U. S. 742, at page 792, the court, speaking of the

failure to petition The Tax Court for a redetermination, said:

> "Failure of respective petitioners to exhaust that procedure has left them with no right to present here issues such as those to coverage and the amount of profits which might have been presented there."

The rule requiring exhaustion of an administrative remedy is one of judicial administration—not merely a rule governing the exercise of discretion—and is applicable to proceedings at law as well as suits in equity. This is the language of the Supreme Court in its opinion in the case of *Myers v. Bethlehem Corp.*, 303 U. S. 41, set forth in note 9 at page 51 of the opinion. The court cites *First National Bank v. Board of County Commissioners*, 264 U. S. 450, 455, and *Anniston Manufacturing Co. v. Davis*, 301 U. S. 337, 343—both suits at law. It is submitted that these two cases sustain the proposition in support of which they are cited, and their logic sustains the Government's contention that The Tax Court has exclusive jurisdiction to decide, in the first instance, all questions presented by appellants in their Answer.

Having executed the Renegotiation Agreement, Section 403(c)(4) of the Renegotiation Act of 1943 prohibits the annulling, modification or setting aside of such agreement, unless there is a showing "of fraud or malfeasance or a willful misrepresentation of a material fact." The special defenses urged by the appellants do not fall within any of these categories.

Conclusion.

A study of the pleadings reveals that appellants' Answer raised only issues over which The Tax Court had exclusive jurisdiction. Having failed to go to The Tax Court, they cannot try issues which the statute expressly provides are within the jurisdiction of The Tax Court. Their contentions are based upon strained and distorted interpretations of the cases cited in order to invoke the aid of the court to relieve them of their own malfeasance. The court found that the contract was valid and there was no fraud or malfeasance or willful misrepresentation in the execution of it. Having determined this, all of the other contentions of the appellants fall of their own weight. This case was exactly the sort to which the remedy by summary judgment was intended.

For the reasons above set forth it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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